

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION**

TOBY C. MCADAM,

Plaintiff,

vs.

UNITED STATES FOOD AND  
DRUG ADMINISTRATION;  
MARGARET HAMBUR,  
COMMISSIONER OF FDA;  
CHARLES BREEN, DIRECTOR  
OF SEATTLE DISTRICT OF  
FDA; MARIAM R. BURBACH,  
ACTING DIRECTOR OF  
SEATTLE DISTRICT OF FDA;  
LISA ALTHAR, COMPLIANCE  
OFFICE OF SEATTLE DISTRICT  
OF FDA; et. al,

Defendants.

CV-14-47-BLG-SPW-CSO

**FINDINGS AND  
RECOMMENDATION OF  
UNITED STATES  
MAGISTRATE JUDGE**

Pending is a Motion to Dismiss pursuant to Rules 12(b)(1), (5), and (6), filed by Defendant United States Food and Drug Administration (“FDA”) and individual Defendants Margaret Hambur, Charles Breen, Mariam R. Burbach, and Lisa Althar, appearing in their official capacities only. *See ECF 6.*

On June 30, 2014, this Court entered an Order finding that

Counts I, II, III, IV, and V of Plaintiff's Complaint were subject to dismissal. *See June 30, 2014 Order (ECF 11) at 9-13.* In the same Order, the Court converted the portion of Defendants' motion to dismiss addressing Count VI (erroneously identified in the Complaint as a second Count IV) into a motion for summary judgment, and afforded Plaintiff Toby C. McAdam ("McAdam") 21 days to respond – until July 21, 2014. *Id. at 17.* McAdam did not respond by this deadline.

The Court also permitted McAdam additional time to effectuate proper service on the FDA and the individual Defendants in both their official and individual capacities on or before July 28, 2014. The Court cautioned that the failure to properly respond as directed by the Order "may result in dismissal of McAdam's complaint." *Id. at 18.* As set forth below, McAdam has not filed proof of proper service of process on the Defendants.

On July 28, 2014, McAdam filed a document titled "Proof of Service," and attached several exhibits, including: (1) an unsigned document titled "Response to Order Dated June 30, 2014 and Plaintiff's Request for Hearing on Defendant's (sic) Motion for Summary Judgement (sic)"; (2) an exhibit containing what appear to be examples of supplement labels; (3) an unsigned copy of the Complaint in this

matter; and (4) an unexecuted and undated summons. *See ECF 12.*

The Court has considered these filings, and for the following reasons will recommend that Defendants' motion to dismiss and motion for summary judgment be granted and McAdam's claims be dismissed.

First, McAdam has not filed sufficient proof of service on the FDA or the individual Defendants sued in their official and individual capacities, despite being given additional time to do so. Among other defects, the summons attached to McAdam's filing, *ECF 12-5*, is not "signed by the clerk" nor does it "bear the court's seal" as required by Rule 4(a), Fed. R. Civ. P. McAdam has provided no proof of service on the Attorney General nor has he provided any proof of service on the individual Defendants. For these reasons, all of McAdams' claims are subject to dismissal.

Second, dismissal is appropriate of Counts I, II, III, IV, and V for the reasons stated in the Court's prior order. *See ECF 11 at 9-13.*

Third, McAdam did not respond to the judicially-converted motion for summary judgment on Count VI by the Court's July 21, 2014 deadline. Under Local Rule 7.1(d)(1)(D), a motion is deemed ripe for ruling "at the close of the time for response." Additionally, McAdam's "Response to Order Dated June 30, 2014 and Plaintiff's Request for

Hearing on Defendant's (sic) Motion for Summary Judgement (sic)", even if considered timely, is not signed, was not properly filed, and does not, in any event, provide any evidence or argument that he has properly exhausted his administrative remedies under the Federal Tort Claims Act, 28 U.S.C. § 2675(a). Thus, considering the substance of McAdam's filing, the Court finds no genuine issue of material fact and concludes that summary judgment on Count VI is appropriate. *See* Rule 56(a), Fed. R. Civ. P.

Based on the foregoing, and for the additional reasons stated in the Court's June 30, 2014 Order,

**IT IS RECOMMENDED** that Defendants' Motion to Dismiss (*ECF 6*), and the portion of said motion converted into a motion for summary judgment, be **GRANTED** and McAdam's claims be dismissed with prejudice.

**NOW, THEREFORE, IT IS ORDERED** that the Clerk shall serve a copy of these Findings and Recommendation of United States Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to the Findings and Recommendation must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after entry hereof,

or objection is waived.

DATED this 31st day of July, 2014.

/s/ Carolyn S. Ostby  
United States Magistrate Judge